

From: Lee, Jeanie

Sent: 2/26/2016 4:39:01 PM

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CC:

Subject: U.S. TRADEMARK APPLICATION NO. 86333078 - JACK BLACK'S LUMBERJACK AMBER ALE - N/A - Request for Reconsideration Denied - Return to TTAB

\*\*\*\*\*

Attachment Information:

Count: 10

Files: 86333078 X-search.jpg, Commerce-1.jpg, Commerce-2.jpg, Commerce-3.jpg, Commerce-4.jpg, Commerce-5.jpg, TTB1.jpg, 201511beer-rev.jpg, BA.jpg, 86333078.doc

**UNITED STATES PATENT AND TRADEMARK OFFICE (USPTO)  
OFFICE ACTION (OFFICIAL LETTER) ABOUT APPLICANT'S TRADEMARK APPLICATION**

**U.S. APPLICATION SERIAL NO.** 86333078

**MARK:** JACK BLACK'S LUMBERJACK AMBER ALE



**CORRESPONDENT ADDRESS:**

RACHEL J. LIN

TARTER KRINSKY & DROGIN LLP

1350 BROADWAY FL 11

NEW YORK, NY 10018-0947

**GENERAL TRADEMARK INFORMATION:**

<http://www.uspto.gov/trademarks/index.jsp>

[VIEW YOUR APPLICATION FILE](#)

**APPLICANT:** Jack Black International Inc.

**CORRESPONDENT'S REFERENCE/DOCKET NO:**

N/A

**CORRESPONDENT E-MAIL ADDRESS:**

docket@tarterkrinsky.com

**REQUEST FOR RECONSIDERATION DENIED**

**ISSUE/MAILING DATE:** 2/26/2016

The trademark examining attorney has carefully reviewed applicant's request for reconsideration and is denying the request for the reasons stated below. See 37 C.F.R. §2.63(b)(3); TMEP §§715.03(a)(ii)(B), 715.04(a).

The following requirement(s) and/or refusal(s) made final in the Office action dated **July 13, 2015** are maintained and continue to be final: Refusal Under Section 2(d) – Likelihood of Confusion. See TMEP §§715.03(a)(ii)(B), 715.04(a).

The following requirement(s) and/or refusal(s) made final in the Office action are satisfied:  
Requirement for Disclaimer and Requirement for Fees – TEAS PLUS Lost. See TMEP §§715.03(a)(ii)(B), 715.04(a).

In the present case, applicant's request has not resolved all the outstanding issue(s), nor does it raise a new issue or provide any new or compelling evidence with regard to the outstanding issue(s) in the final Office action. In addition, applicant's analysis and arguments are not persuasive nor do they shed new light on the issues. Accordingly, the request is denied.

Applicant correctly states that in a likelihood of confusion analysis, the Examining Attorney may consider, among other variables, the strength of the marks. See Request for Reconsideration at p.1. It is also correct that between marks sharing words or terms that are weak, consumer confusion is not as likely. In the case at hand, however, the term "LUMBERJACK" in the respective marks is not weak or diluted.

The term "LUMBERJACK" is only registered *once* on the register, and has only ever been registered one time on the register. Specifically, a search of third-party marks on USPTO's X-Search database for the following parameters: (\*LUMBER\* and \*JA{"CKQX"}\*)[bi,ti] and "032"[ic], retrieving all hits for marks that contain any combination of marks containing the term LUMBER with variations of the term JACK, shows only the following six results highlighted in bold below. See attached screenshot and copies of the X-Search database results.

Display of Hit List for application #86333078

#	Hits	Live	Dead	Tagged	Printed	Pl.	Search term
		Viewed	Marks				
06	6	2	4				(*LUMBER* and *JA{"CKQX"}*)[bi,ti] and "032"[ic]

# Serial Regnum Status Mark

**1 86333078 V JACK BLACK'S LUMBERJACK AMBER ALE**

**2 85802630 D LUMBERJACK**

**3 78195079 D LUMBERJACK ALE**  
**4 76368060 2674658 V® LUMBERJACK OATMEAL STOUT**  
**5 75362892 D LEINENKUGEL'S LUMBERJACK**  
**6 74658932 D CANADIAN LUMBERJACK**

The first instance of the term “LUMBERJACK” was for “CANADIAN LUMBERJACK” which was published in the Official Gazette on January 30, 1996, but abandoned soon thereafter on April 24, 1997, before “LEINENKUGEL'S LUMBERJACK” filed on September 25, 1997 and abandoned on January 29, 2000 after failing to file a Statement of Use. Registrant filed for its mark, “LUMBERJACK OATMEAL STOUT” on February 7, 2002 and was registered January 14, 2003, and it has since been the only registration bearing the terms “LUMBER” and “JACK” for beer. The mark, “LUMBERJACK ALE”, abandoned after being met with a refusal citing the registrant’s mark, and the mark for “LUMBERJACK”, for non-alcoholic beverages, also abandoned for failure to file a Statement of Use. Altogether, this evidence shows that there has never been more than once instance of “LUMBERJACK” registered on the database, and that the term is and has always been strong in relation to beer.

Further, in applicant’s request, it explains that through a discussion with the Examining Attorney, “it was established that ‘evidence of online website using ‘LUMBERJACK’... would suffice as ‘evidence showing current and actual use in the marketplace’. This discussion was to clarify the following sentence in the Final Office action: “Additionally, while applicant has submitted extrinsic evidence of online websites using “LUMBERJACK” with beers; however, there is no evidence showing current and actual use in the marketplace.”

The evidence provided by applicant shows at most, six possible beers containing the wording “LUMBERJACK” in the name, apart from applicant’s mark, registrant’s mark, and one mark for restaurant services; however, applicant has not submitted any registrations for “LUMBERJACK” as it relates to beer.

As shown by the attached evidence <https://www.uschamber.com/> and <http://www.ttb.gov/>, an article explains that one Malt Beverage Labeling Specialist approved at least 29,500 in one year alone, and approved 133 labels, daily. Further, according to the Brewers Association, there are currently 7,126 breweries in the United States, each making their own beers. Therefore, six to eight instances of possible usage of “LUMBERJACK” as applied to beer cannot be considered sufficient in finding weakness or dilution when viewed in the context of thousands of beer labels. See attached screenshots from <https://www.brewersassociation.org/>.

In its Request for Reconsideration, applicant also provided evidence of the wording “LUMBERJACK”; however, this evidence was irrelevant as it was for goods other than beer, such as drinking glasses and

bottle openers. Further, applicant provides Exhibit 1 in which a blog post states, “As you may know, lumberjacks love beer. As a nod to their love of beer, they have many beers named after them.” However, the pictures that the post includes to illustrate this statement are of mountain men with plaid shirts and an illustration of “PAUL BUNYUN”, which is not the same as the wording “LUMBERJACK”. Therefore, this particular evidence does not establish weakness in the wording “LUMBERJACK” as applied to beer.

Here, the overriding concern is not only to prevent buyer confusion as to the source of the goods, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer. See *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993).

The Trademark Act not only guards against the misimpression that the senior user is the source of the junior user’s goods, but it also protects against “reverse confusion,” that is, the junior user is the source of the senior user’s goods. *In re Shell Oil Co.*, 992 F.2d 1204, 1208, 26 USPQ2d 1687, 1690 (Fed. Cir. 1993); *Fisons Horticulture, Inc. v. Vigoro Indust., Inc.*, 30 F.3d 466, 474-75, 31 USPQ2d 1592, 1597-98 (3d Cir. 1994); *Banff, Ltd. v. Federated Dep’t Stores, Inc.*, 841 F.2d 486, 490-91, 6 USPQ2d 1187, 1190-91 (2d Cir. 1988).

When viewing the respective marks, “JACK BLACK’S LUMBERJACK AMBER ALE” and “LUMBERJACK OATMEAL STOUT”, a consumer may be led to believe that “JACK BLACK” also provides registrant’s oatmeal stout goods.

Therefore, any doubt regarding a likelihood of confusion determination is resolved in favor of the registrant. TMEP §1207.01(d)(i); see *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 1265, 62 USPQ2d 1001, 1003 (Fed. Cir. 2002); *In re Hyper Shoppes (Ohio), Inc.*, 837 F.2d 463, 464-65, 6 USPQ2d 1025, 1026 (Fed. Cir. 1988).

The Court of Appeals for the Federal Circuit and the Trademark Trial and Appeal Board have recognized that marks deemed “weak” or merely descriptive are still entitled to protection against the registration by a subsequent user of a similar mark for closely related goods and/or services. TMEP §1207.01(b)(ix); see *King Candy Co. v. Eunice King’s Kitchen, Inc.*, 496 F.2d 1400, 1401, 182 USPQ 108, 109 (C.C.P.A. 1974) (likelihood of confusion is “to be avoided, as much between ‘weak’ marks as between ‘strong’ marks, or as between a ‘weak’ and ‘strong mark’”); *In re Colonial Stores, Inc.*, 216 USPQ 793, 795 (TTAB 1982) (“even weak marks are entitled to protection against registration of similar marks”). This protection extends to marks registered on the Supplemental Register. TMEP §1207.01(b)(ix); see, e.g., *In re Clorox Co.*, 578 F.2d 305, 307-08, 198 USPQ 337, 340 (C.C.P.A. 1978); *In re Hunke & Jochheim*, 185 USPQ 188, 189 (TTAB 1975).

If applicant has already filed a timely notice of appeal with the Trademark Trial and Appeal Board, the Board will be notified to resume the appeal. *See* TMEP §715.04(a).

If no appeal has been filed and time remains in the six-month response period to the final Office action, applicant has the remainder of the response period to (1) comply with and/or overcome any outstanding final requirement(s) and/or refusal(s), and/or (2) file a notice of appeal to the Board. TMEP §715.03(a)(ii)(B); *see* 37 C.F.R. §2.63(b)(1)-(3). The filing of a request for reconsideration does not stay or extend the time for filing an appeal. 37 C.F.R. §2.63(b)(3); *see* TMEP §§715.03, 715.03(a)(ii)(B), (c).

/Jeanie H. Lee/

Examining Attorney

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Classic | Document | TRAM | Images | Hit List | Assignments | TTABVue |

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### JACK BLACK'S LUMBERJACK AMBER ALE

**Mark**

JACK BLACK'S LUMBERJACK AMBER ALE  
Goods and Services

IC 032. US 045 046 048. G & S: Beer

Standard Characters Claimed  
STANDARD CHARACTERS CLAIMED

Mark Drawing Code  
(4) STANDARD CHARACTER MARK

Serial Number  
86333078

Filing Date  
July 10, 2014

Current Filing Basis  
IB

Original Filing Basis  
IB

Owner Name and Address  
(APPLICANT) Jack Black International Inc. CORPORATION CANADA 5422 Yew Street Vancouver, B.C. CANADA V6M3X8

Disclaimer Statement  
NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "AMBER ALE" APART FROM THE MARK AS SHOWN

Type of Mark  
TRADEMARK

Register  
PRINCIPAL

Other Data  
The name(s), portrait(s), and/or signature(s) shown in the mark does not identify a particular living individual.

Live Dead Indicator  
LIVE

Attorney of Record  
Philip Y. Braginsky

**Text to Search**

(LUMBER\* and \*JA(CKQX\*)) [b,n] and \*3Z [c]

#	Hits	Status	Search term
1	6		(*LUMBER* and *JA(CKQX*)) [b,n]

Hit List | Tag List | All Tagged | Browse | Strategy |

#	Serial	RegNum	Status	Mark	Go To
<input checked="" type="checkbox"/>	1	86333078	D	JACK BLACK'S LUMBERJACK	
<input type="checkbox"/>	2	85802630	D	LUMBERJACK	
<input type="checkbox"/>	3	78195079	D	LUMBERJACK ALE	
<input type="checkbox"/>	4	76368060	2674658	LUMBERJACK CANTHRELL	
<input type="checkbox"/>	5	75362892	D	LEIBENFUEHL'S LUMBER	
<input type="checkbox"/>	6	74658932	D	CANADIAN LUMBERJACK	

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U.S. Chamber of Commerce  
Standing Up for American Enterprise

CLEAN POWER PLAN  
Clean Power Plan Will Mean 'Economic Disaster,' State

TIP  
House Small Biz Leader: Entrepreneurs Need These

DEAR 45  
With Taxes, Is It Accurate to Call Some Companies

TAXES  
It Feels Like Groundhog Day on Capitol Hill with Tax

REGULATORY REFORM  
Dear 45: In This Weak Economy, Doing Nothing Is Not

## Above the Fold

WHAT YOU NEED TO KNOW ABOUT POLICY THAT AFFECTS THE BUSINESS COMMUNITY

AUG 13, 2014 - 5:45PM

### One Man Approves Every Beer Label in America

SEAN HACKBARTH  
Senior Editor, Digital Content



#### MORE FROM AGRICULTURE AND FOOD SAFETY

7 months 3 weeks  
FDA Tosses Menu Labeling Delay to Pizzerias and Supermarkets

11 months 2 weeks  
The U.S.-Korea Free Trade Agreement at Three

12 months 9 hours  
Studies Cast Doubt on Value of Mandated Calorie Counts

Our Position on Agriculture and Food Safety



Tim Mak at *The Daily Beast* might have found the hardest-working man in Washington, D.C., who happens to be a critical player in the \$247 billion American beer industry. Kent Martin, a regulator in the Treasury Department's Tax and Trade Bureau, approves every beer label and bottle in America. He also happens to go by the name, "Battle."

Mak writes:

*This year, Battle has singlehandedly approved over 29,500 beer labels, the only fact his press handler would provide. The TTB would not even provide basic biographical details about the famed regulator, much less make him available for an interview.*

...

*Battle lives for his work. Brewers talk about receiving approvals at all hours of the day and night; notices from the federal government coming in at 5 a.m., or 1 a.m.*

*"We kid about it a lot, but if there's an airstrike in Washington, he's the guy grabbing his work to go to a bunker to keep his production up," said a source who has worked with Battle.*

*He's been spotted at a craft brewers' conference, with several laptops going at once, processing multiple beer labels simultaneously. "I've never seen anyone working as hard as him," said Scott Newman-Bate, who works with Short's Brewing Company.*

Martin is a machine, approving about 133 labels daily.

Being a creative bunch, brewers have often battled with "Battle" Martin.

*Battle has rejected a beer label for the King of Hearts, which had a playing card image on it, because the heart implied that the beer would have a health benefit.*

*He rejected a beer label featuring a painting called *The Conversion of Paula By Saint Jerome* because its name, *St. Paula's Liquid Wisdom*, contained a medical claim—that the beer would grant wisdom.*

*He rejected a beer called *Pickled Santa* because Santa's eyes were too "googly" on the label, and labels cannot advertise the physical effects of alcohol. (A less googly-eyed Santa was later approved.)*

All About Beer magazine has a story about some adventures craft brewers have had in getting labels approved. One brewer got in trouble for being too patriotic:

*In the early 1990s, Jack Joyce of Rogue Ales in Newport, OR, submitted his American Amber Ale for label approval. The government rejected the label, which showed an Uncle Sam-like figure hoisting a beer with the American flag fluttering in the background. Rogue, it seems, had run afoul of U.S. Code Title 4, Chapter 8, Item 1: "The U.S. flag should never be used for advertising purposes in any manner whatsoever." So Joyce redesigned the label to portray a generic pattern of red and white stripes with a single row of stars as a border.*

*However, he continued to use the flag design for glasses, T-shirts, tap handles, etc. until 2005, when a TTB agent, vacationing in Oregon, spotted a Rogue truck painted with the original logo. Ordered to cease and desist, Joyce repainted his trucks and destroyed or gave away between \$15,000 and \$25,000 worth of promotional items. He was able to salvage his tap handles by painting out the stars. "We solved that by basically desecrating the flag," he observed ironically.*

After the 2013 federal government shutdown, some craft brewers feared that the backlog of label approvals would cut into their business.

Now that's something to talk about at your next happy hour.

Follow Sean Hackbarth on Twitter at [@seanhackbarth](#) and the U.S. Chamber at [@uschamber](#).

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MORE ARTICLES ON: AGRICULTURE AND FOOD SAFETY



### Sean Hackbarth

Senior Editor, Digital Content

Sean has written for various Chamber properties since 2012. In 1999, Sean launched a "weblog" and never looked back, becoming a self-proclaimed pioneer of the medium.

[@seanhackbarth](#)  
[shackbarth@uschamber.com](mailto:shackbarth@uschamber.com)

## Above the Fold

### Is Cheap Oil Good or Bad for the U.S. Economy? Yes

The answer has changed over time and remains rather complicated.

J.D. FOSTER



### Labor's Retirement Rule Would Throw Small Business Retirement Plans Out With the Bathwater

The rule will reduce small business employees' access to retirement savings options.

ALIYA WONG

### U.S. Government Enlists Hackers to Help Break Down Global Trade Barriers

J.D. HARRISON



#### TAXES

### It Feels Like Groundhog Day on Capitol Hill with Tax Inversion Politics

CAROLINE L. HARRIS



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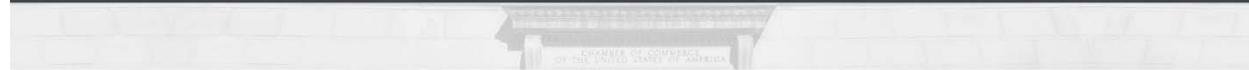
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Labor	China	Global Intellectual Property Center	SoundCloud	
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Regulatory Reform	India	Institute for Legal Reform		
Retirement	Japan Korea	Institute for Organization Management		
Taxes	South Asia	Labor, Immigration and Employee Benefits		
Technology	Southeast Asia	Let's Rebuild America		
Transportation	Turkey and Middle East	U.S. Chamber Litigation Center		
Travel and Tourism	Amcham Directory	National Security & Emergency Preparedness		
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## TTB NEWSLETTER | Weekly News

June 5, 2015

### IN THIS ISSUE

Greetings! We hope you had a stupendous and thrilling week! This week's top stories include announcements about Battle Martin's retirement, the newly-appointed malt beverage label point person, TTB HQ mailing address, and a list of the week's top COLAs Online resource pages at TTB.gov.

#### BATTLE MARTIN, THE "TTB BEER LABEL GUY," HAS RETIRED



TTB's Malt Beverage Labeling Specialist, Kent Battle Martin, retired Thursday, May 28, 2015. A recipient of the Administrator's Award, TTB's highest honor, Battle almost single-handedly reviewed every malt beverage label application submitted since he joined TTB in October of 2004.

Battle (and no, "Battle" isn't a nickname -- he was named after his grandfather, John Battle Martin), an attorney and ex-layoff officer, came to TTB after working at the Equal Employment Opportunity Commission, which he joined after spending a year at the Immigration and Naturalization Service. October 2014 marked his 20th year of government service. TTB isn't where he developed his passion for beer, however. He has helped out at his family's bar, which opened in 1962, by doing everything from bartending to actually managing the place.

Battle assists an industry member during a recent beer industry trade show.

During Battle's tenure as a label specialist, he adeptly handled an incredible increase in malt beverage COLA workload. In 2013, Battle processed over 27,000 label applications, and in 2014, he processed over 33,000. In fact, in the first 8 months of this fiscal year (Oct. - May), he already processed 25,000 applications, which is roughly the same number for all of 2012!

On top of processing COLAs, Battle also spent significant time on the phone and answering emails, helping industry members with the intricacies of TTB's regulations on malt beverage labels and formulas. He was also a very popular person at many beer industry conferences and trade shows over the years, providing advice, presenting seminars, and even processing people's malt beverage label applications on the spot!

Battle's departure marks the end of an era at TTB. We appreciate all of Battle's hard work and dedication, along with his many accomplishments. We wish him farewell and good luck in his retirement!

#### NEW MALT BEVERAGE LABELING SPECIALIST

Michael Webster is now the lead TTB contact for malt beverage labeling. Please direct your malt beverage labeling calls to 866-927-2533, option 8, or contact us by email at [mla@ttb.gov](mailto:mla@ttb.gov).

#### TTB HEADQUARTERS MAILING ADDRESS

This is a reminder to ensure you use our correct mailing address, particularly our current ZIP code, when sending correspondence to TTB Bureau Headquarters:

Alcohol and Tobacco Tax and Trade Bureau  
1310 G Street, NW, Box 12  
Washington, DC 20005

Failure to use the correct Box number and ZIP code can lead to significant delays in TTB receiving your mail.

[TTB Newsletter Archives >>>](#)



#### WHAT'S POPULAR ON TTB.GOV

##### Top COLAs Online Customer Support Pages for May 25-31, 2015

- Allowable Revisions to Approved COLAs
- Personalized Labels
- Processing Times for Label Applications
- COLAs Online Application Process
- Labeling Homepage

#### ABOUT THE NEWSLETTER

The TTB Newsletter compiles the top TTB news of the week and other helpful information about the Bureau and the federal alcohol and tobacco laws and regulations we enforce.

Please send any questions or comments to the Executive Liaison for Industry and State Matters at [Industry-State.Liaison@ttb.gov](mailto:Industry-State.Liaison@ttb.gov).

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**DEPARTMENT OF THE TREASURY**  
**ALCOHOL AND TOBACCO TAX AND TRADE BUREAU**  
**STATISTICAL REPORT - BEER**

**Report Date:**  
16-FEB-2016  
**Report Symbol:**  
TTB S 5130-11-2015

**Reporting Period:** November 2015

**Page:** 1 of 1

<b>MANUFACTURE OF BEER (IN BARRELS)</b>	<b>Current Month</b>	<b>Prior Year Current Month</b>	<b>Current Year Cumulative Year to Date</b>	<b>Prior Year Cumulative Year to Date</b>
Production	13,343,501	13,554,838	176,360,646	178,216,222
<b>Removals</b>				
<b>Taxable (\$7.00/\$18.00 per barrel)</b>				
In bottles and cans	11,147,980	11,363,974	144,748,532	146,464,100
In kegs	1,177,309	1,185,823	15,927,700	16,456,215
Tax Determined, Premises Use	4,493	6,707	860,457	475,934
<b>Sub Total Taxable</b>	<b>12,329,782</b>	<b>12,556,504</b>	<b>161,536,689</b>	<b>163,396,249</b>
<b>Tax-free</b>				
For export	551,590	434,254	5,766,742	5,051,888
For vessels and aircraft	0	0	124	51
Consumed on brewery premises	1,448	1,331	90,198	76,030
<b>Sub Total Tax-Free</b>	<b>553,038</b>	<b>435,585</b>	<b>5,857,064</b>	<b>5,127,969</b>
<b>Total Removals</b>	<b>12,882,820</b>	<b>12,992,089</b>	<b>167,393,753</b>	<b>168,524,218</b>
Stocks On Hand end-of-month:	10,024,222	10,055,047	117,478,383	119,598,770
<b>MATERIALS USED AT BREWERIES (IN POUNDS)</b>				
Malt and malt products		251,007,456		3,533,619,826
Corn and corn products		31,876,185		546,771,474
Rice and rice products		38,579,400		567,388,472
Barley and barley products		8,852,396		158,616,280
Wheat and wheat products		1,349,702		31,935,542
<b>Total Grain products</b>		<b>331,665,139</b>		<b>4,838,331,594</b>
Sugar and syrups		61,647,473		838,589,475
Hops (dry)		1,373,691		26,521,788
Hops (used as extracts)		258,594		3,570,347
Other		13,248,548		182,571,551
<b>Total Non-Grain products</b>		<b>76,528,306</b>		<b>1,051,253,161</b>
<b>Total Used</b>		<b>408,193,445</b>		<b>5,889,584,755</b>

258,594 Pounds of hops is equivalent to 388,692 pounds of extract NOV 2014

NOTE: Changes in figures from prior reports could be due to amended reports being filed.  
 This data is not final and may need to be amended.

1 Barrel is equivalent to 31 gallons.

Report Re-Issued

<http://www.ttb.gov>

